Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: October 12, 2007

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: Proposed Contract for Design and Environmental Work on the Regents Road Bridge

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INTRODUCTION

The City Attorney's Office has twice previously opined that a proposed contract between the City and Project Design Consultants [PDC] for the final design of a bridge on Regents Road may not be lawfully entered into because it would violate sections 1090 and 87100 of the California Government Code. See City Attorney's Memoranda of April 4, 2007 and July 24, 2007 (attached). This conclusion arose from the fact that PDC was retained in 2003 to perform an evaluation of several alternatives for improving traffic flow in University City, including the Regents Road Bridge [Phase I], and was at that time also promised a subsequent contract, without any intervening competitive procurement process, to design any alternative that the City might choose to build as a result of the earlier study [Phase II]. As a result of this arrangement, PDC had an inherent incentive, when performing Phase I, to present analyses to the City that would result in the most lucrative Phase II contract.

On July 22, 2007, outside counsel for the City issued a memorandum questioning the conclusions in this office's April 4, 2007 memorandum; this office's July 24, 2007 memo responded to outside counsel's memo. On September 4, 2007, the City Council first considered an ordinance approving this contract despite the City Attorney's continued concerns. At that hearing, Michael Cowett, a partner at the law firm of Best, Best & Krieger [BBK], representing PDC, offered brief verbal comments contending that no violation of section 1090 would affect the proposed Phase II contract. Mr. Cowett did not offer an opinion on the section 87100 violation. Second reading of the ordinance was scheduled for October 9, 2007. At that hearing, BBK, this time represented by Attorney Sophie Akins, reiterated its contentions on PDC's behalf. Also on October 9, 2007, the City Attorney's office presented both a verbal explanation of its continuing concerns, and a description of the relevance of certain documents showing that PDC's Phase I work was actually affected by its financial interest in Phase II, some of which documents had been recently discovered. Prior to the conclusion of the City Attorney's

presentation, the Council President requested continuance of the item for one week, and requested that the City Attorney's updated analysis be reduced to writing. This memorandum and its attachments fulfill that request.

QUESTIONS PRESENTED

1. How has the emergence of new information since September 4, 2007 affected the City Attorney's prior opinion that the proposed design contract is unlawful?

2. How has the analysis presented by PDC's attorney at the September 4, 2007 and October 9, 2007 Council hearings affected the City Attorney's prior opinion that the proposed design contract is unlawful?

SHORT ANSWERS

1. The California Court of Appeals, Fourth District (San Diego) released its decision in *Lexin v. Superior Court*, 154 Cal. App. 4th 1425, on September 7, 2007. In addition to reiterating and clarifying controlling law as discussed in our earlier memoranda, *Lexin* cast additional light on the relevance of e-mail communications that establish that PDC knew that its work on the Phase I contract would affect its financial interest in the Phase II contract, including some such communications that were discovered after September 4, 2007. These communications strongly suggest that PDC altered its analysis for the purpose of casting a favored alternative in the best light, thus increasing the likelihood that that alternative would form the Phase II scope of work. Moreover, a recently discovered communication from PDC explicitly states that this outcome was PDC's objective throughout its Phase I engagement.

2. PDC's attorneys suggested at the September 4, 2007 and October 9, 2007 Council hearings that section 1090 does not apply to PDC in this context. This contention is based on the view that PDC is not an "employee" of the City because it did not exercise "considerable influence" over the Council. These contentions are at odds with the overwhelming weight of the case law under section 1090, as well as the facts at hand. First, the law is crystal clear that section 1090 applies not only to employees but also to independent contractors of a public agency when they participate in the making of a contract. Second, the law clearly establishes that, in considering a section 1090 question, we must examine PDC's role through the "whole" of the transaction, including its "continuing course of conduct" over the entire Phase I period. There is no question that PDC contributed significantly to the process when viewed as a whole.

ANALYSIS

We have continued to monitor developments in case law, and to examine the documentary evidence related to the conflict of interest questions regarding this contract, in the time following the first reading of the ordinance that would approve the PDC Phase II contract.

In addition, we have examined BBK's analysis as presented at both prior hearings on this issue. We continue to be firmly of the opinion that the proposed PDC Phase II contract would complete a violation of section 1090 (which prohibits public officials, including consultants, from participating in the making of any contract in which they have a financial interest), and of section 87100 (which prohibits public officials from participating in the making of any governmental decision in which they have a financial interest). The release of the *Lexin* ruling, additional evidence, and a review of the BBK analysis all have reinforced this conclusion.

I. *Lexin v. Superior Court*, 154 Cal. App. 4th 1425 (4th Dist., September 7, 2007)

On September 7, 2007, the California Court of Appeals for the Fourth District, which includes San Diego, released its lengthy opinion in *Lexin v. Superior Court*, 154 Cal. App. 4th 1425, finding that certain members of the San Diego City Employees Retirement System board could be prosecuted for violations of section 1090. *Lexin* reiterated much of the long-established case law cited in our earlier memoranda. *Lexin* affirmed that 1) section 1090 does not require actual bias affecting the performance of a public official's duties, because a public official who has a conflict of interest "should not be trusted, even if he attempts impartiality." *Lexin*, 154 Cal. App. 4th at 1452; 2) the prohibited financial interests under section 1090 "extend to expectations of economic benefit" which "may be direct or indirect and include[ ] the contingent possibility" of financial gain. *Id*. at 1453; 3) participating in the making of a contract includes not only finally drafting, approving, and executing a contract but also "planning, preliminary discussion, compromises, drawing of plans and specifications and solicitation of bids that led up to the formal making of a contract." *Id*. at 1454; 4) that section 1090 applies not only to actual decision makers but also to those in positions where they "could exercise influence" over the making of a contract. *Id*; and 5) that section 1090 is "concerned with any interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolutely loyalty and undivided allegiance" to the public body. *Id*. at 1455.

In addition, *Lexin* clarified two additional principles. First, *Lexin* holds that, in examining a potential section 1090 violation, one must look not only to the conduct that led directly or indirectly to the making of the contract, but also to the "continuing course of conduct" of the government official in question during the entire time that decisions were considered and made that ultimately resulted in the contract. *Id*. at 1455. PDC's action at every portion of Phase I are thus relevant to the section 1090 inquiry, since those actions were means by which PCD "could exercise influence" over the scope of the Phase II contract.

Second, *Lexin* affirmed prior holdings that, to violate section 1090, an official need not know that his actions are illegal, but only that he has a financial interest in the contract the making of which he may influence. *Id*. at 1465. In legal parlance, a requirement of knowledge that is necessary to support a finding is commonly called a "scienter" requirement. Having knowledge of a potential interest in a contract, the official may not "participate in the process that leads to the making of the contract." *Id*. at 1466. Thus, evidence of PDC's knowledge during Phase I of its Phase II interests during takes on added importance in light of *Lexin*.

II. The Relevance of E-mail Communications, Under *Lexin* and Pre-existing Case Law

The "continuing course of conduct" principle and the clarification of the section 1090 *scienter* requirement have taken on added importance in light of certain communications that took place among PDC, its subconsultants, and City staff during Phase I. Some of these documents have been discovered since the September 4, 2007 hearing, while others were discovered previously but have taken on new importance in light of *Lexin*. These communications are discussed below in chronological order, and are attached hereto in the same order.

First, PDC's Bruce McIntyre, on October 15, 2004, informed a number of PDC employees, subconsultants, and City staff that he had "changed the orientation on the comparison graphics from change in delay to change in LOS."[1] See Page 1 of Appendix. The reason for this change was to resolve "Gordon's[2] concern over why the Grade Separation appeared as good as the Community Plan[3] alt." The "Grade Separation" was a traffic improvement option that did not include the Regents Road Bridge; the "Community Plan" would have included both the Bridge and the widening of Genesee Avenue. Thus, the stated reason for discarding one method of measuring traffic flow improvements in favor of another was that the first method did not cast a preferred alternative in a sufficiently favorable light.

Following up on this message on October 20, 2004, Mr. Lutes opined that "The Community Plan is clearly the best" alternative among those studied. Appendix, Page 2. Responding later that evening, subconsultant Lewis Michaelson questioned this conclusion, explaining that he would not be willing to support Mr. Lutes' conclusion in an anticipated meeting with Council President Peters: "I nominate Gordon to go to the meeting with Scott. I would have a hard time using the word 'clearly' in front of 'best.'" Appendix, Page 3 (bottom). Mr. Michaelson then listed numerous factors that, in his view, favored merely widening Genesee Avenue without building the Regents Road Bridge, which factors "Gordon wasn't using" in favoring the Community Plan. Mr. Michaelson also strongly implied that he was uncomfortable with the switch from measuring change in delay to measuring change in LOS, suggesting that the "underwhelming" results of the change in delay study will eventually come out and will undermine PDC's attempts to advocate for the Community Plan.

Agreeing with Mr. Michaelson the next day, subconsultant Sara Katz observed that, although the PDC team had expected their analyses to favor the Community Plan, she did not

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[1] "LOS" stands for "level of service." Change in delay represents the amount by which travel times between given points would change as a result of a given upgrade to transportation infrastructure; level of service is a qualitative description of operating conditions that occur on a given segment of roadway under various traffic volume loads. Thus, "change in delay" and "change in level of service" are alternative methods of measuring traffic improvements.

[2] "Gordon" is Gordon Lutes, a principal of PDC.

[3] The "Community Plan" would have involved both widening Genesee Avenue and building the Regents Road Bridge.

agree with Mr. Lutes that that conclusion was supportable in the end, because "the cumulative factors just did not tell the story we all thought they would." Appendix, Page 3 (top). In Ms. Katz's view, only traffic data (which Mr. McIntyre had altered, per Mr. Lutes' desires, to favor the Community Plan) supported Mr. Lutes' view, and not strongly, while weighing other factors made his conclusion unsupportable other than by "intuition."

These communications are relevant to the section 1090 analysis not because they cast doubt on the correctness of the ultimate choice of an alternative. Rather, they inform the inquiry as to whether the "continuing course of conduct" by PDC involved an ability to alter its conduct in a way that would significantly influence the City's decision on what, if anything, to build. They show that PDC had the ability to manipulate methods of estimating and presenting projected effects of various alternatives, by choosing how to measure effects, and by choosing which factors to allow to influence its conclusions. And they show that PDC did manipulate this data, at least to some degree, to affect which alternatives would look best.

An observation from pages 7-8 of our April 4, 2007 memo bears repeating here: A finding of actual bias affecting a consultant's work is not a necessary element of a section 1090 violation. However, as we observed at that time, *People v. Sobel*, 40 Cal. App. 3d 1046 (1974) establishes that a stronger section 1090 case exists where if PDC "had the opportunity to, and did influence" the making of the contract. The e-mails discussed to this point show both that the opportunity existed and that it was taken.

A later e-mail informs the inquiry in a different way. On February 3, 2006, E&CP Project Manager Kris Shackelford and Department Director Patti Boekamp discussed who should attend a meeting of the San Diego Highway Development Association at which the ongoing Phase I study was expected to be discussed. Ms. Shackleford's response to Ms. Boekamp's inquiry is enlightening. In pertinent part, she said:

> Gordon [Lutes] asked if it would be O.K. for him to do it. I told him that it would be too risky. We are too close and I can't afford for things to go south at this point…I didn't think it would be a good idea for Gordon to be involved, even on his own time. If a "Project" is selected, PDC will get a large contract and the fact that the name "Highway Development Association" is already tainted the scene [sic], I can't see how we can win this one as far as the public perception is concerned. Appendix, Page 4.

This message is significant because it shows not only that E&CP Staff was aware of PDC's conflict of interest during the Phase I work, but more important, that that awareness was communicated to Mr. Lutes. Thus, while it seems obvious that PDC must have been aware of its financial interest in the making of the Phase II contract and the effects of its Phase I work on that contract, this e-mail provides concrete evidence that City Staff discussed that interest, and its potential effect on public perception, with PDC. Thus, the *Lexin* requirement that PDC was

aware of their financial interest in the Phase II contract, and that that interest would be affected by their Phase I work, is supported by concrete evidence.

Finally, all of these considerations come to bear one last time in a single e-mail from Mr. Lutes to PDC's employees and subconsultants on August 1, 2006. This was the day that the City Council approved a resolution selecting the Regents Road Bridge as the alternative to be implemented. After that Council action, Mr. Lutes wrote the following message to several of PDC's staff and subconsultants:

> Congratulations Team! For those who may have missed it….the City Council voted to Certify the EIR ***and select the Regents Road Bridge alternative.***
>
> Key participants in the 45 minute staff presentation were Andy, Keith and Bruce! A key player behind the scenes – especially this last 2 weeks was Theresa as she worked with Bruce to craft the findings and overriding considerations[4] as well as defend the EIR from ***those opposing the Bridge*** including the City Attorney.
>
> ***There will be lots more work before any project is built***, but we need to celebrate the victories when they come. ***Thanks for your 3+ years of work*** on this important project…..
>
> Edited, and with emphasis supplied, from Appendix, Page 5

The legal significance of this message is that it conveys PDC's overarching goal over the course of "3+ years of work." The victory that was won was not merely certification of the EIR, but also selection of the Bridge alternative. The victory that was achieved through that "3+ years of work" was a victory over "those opposing the Bridge." And finally, PDC was well aware, even in that moment of "victory," that they had "lots more work" to do, since they fully expected to move immediately forward with a contract to design the bridge.

There can be no doubt from this message that PDC viewed its Phase I mission, which it pursued over more than three years, not as presenting an unbiased evaluation of alternatives that would serve the public interest, but as achieving approval of the Regents Road Bridge Alternative so that it could move onto the next phase, for which it would be paid nearly $5 million.

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[4] "Theresa" refers to Theresa McAteer, a private attorney who drafted the referenced documents, which are necessary to support approval of a project that, like the Regents Road Bridge, would have significant and unmitigatable environmental impacts. It is telling that these documents were only created with respect to the Bridge, and not for any other alternative studied, despite the fact that it was claimed that the EIR did not recommend any project over the others and that the City Council had not, when they were drafted, expressed a preference for any alternative. By choosing to draft these documents for only one alternative, PDC and its team again sought to increase the likelihood that that alternative would be selected.

III. Best, Best & Krieger's Contention that PDC has not Violated Section 1090

Finally, as noted above, BBK presented its contention that the proposed contract would be lawful at both the September 4 and October 9, 2007 hearings. The substance of those contentions was most completely stated by Ms. Akins on October 9, 2007:

> …As a threshold matter, PDC is not an employee subject to section 1090. PDC is an independent contractor of the City and does not exert considerable influence over the City Council. However, even if PDC were constructively deemed to be a City employee subject to section 1090, we have concluded that no conflict of interest precludes the City from awarding the agreement for Phase II services to PDC today.

The contention that PDC was not subject to section 1090 because it was "not an employee" is not only without support in the case law construing that statute, but in fact directly contradicts decades of consistent rulings. Applying section 1090 to find that an outside attorney retained by a city was subject to section 1090, the California Court of Appeals held in 1956 that "A person merely in an advisory position to a city is affected by the conflict of interest rule." *Schaefer v. Berinstein*, 140 Cal. App. 2d 278, 291 (1956). The question was not whether the outside attorney was in position to generally "exert considerable influence over the City Council" and thus become a *de facto* employee, as BBK seemed to assume, but whether he was "in a position to advise the city council as to what action should be taken relative to the property involved [which the attorney sought to buy]." *Id.*

Relying heavily on *Schaefer*, the California Attorney General in 1965 applied section 1090 to a temporary financial consultant, finding that the distinctions between employees and independent contractors that control in other contexts do not limit the application of section 1090, which is to be broadly construed. 46 Cal. Ops. Atty. Gen. 74, 78-79 (1965). The 1965 Attorney General's Opinion has been cited approvingly on this question as recently as March of 2007 in *California Housing Finance Agency v. Hanover/California Management and Accounting Center*, 148 Cal. App. 4th 682, 692 (2007). Under *Hanover/California*, "the officer or employee language of Section 1090 must be interpreted broadly. The fact that someone is designated an independent contractor is not determinative; the statute applies to independent contractors who perform a public function."[5] *Id*. at 690. There can be absolutely no doubt that section 1090

[5] Ms. Akins' October 9, 2007 comments also imply that it is a necessary element of a section 1090 violation that the consultant exert "considerable influence' over the public agency. This contention is without support in the case law. The phrase "considerable influence" has only appeared twice in cases under section 1090, once in *Hanover/California* and once in *People v. Gnass*, 101 Cal. App. 4th 1271, 1298 (2002). In neither case is there any suggestion that the court was describing a mandatory requirement; in both cases the court was summarizing the actual facts of the case. But in any event, there is little doubt that, even if this were a mandatory requirement, PDC and its team did exert considerable influence over the process that led the Council to select the Regents Road

applies to consultants of public agencies, at least within the realm where they actually provide advice.[6] And there is no doubt that in PDC's case, the prohibited Phase II financial interest was directly related to the subject matter of the advice it was hired to give in Phase I.

CONCLUSION

New case law, new evidence, and new outside analysis have all come to light since the proposed ordinance approving the Phase II PDC contract was introduced on September 4, 2007. All of these new considerations lend additional support to our original conclusion that the proposed contract would violate section 1090, as well as section 87100. A contract that arises from a violation of section 1090 is void. *Thompson v. Call*, 38 Cal. 3d 633, 646 (1985).

Given these considerations, the Office of the City Attorney remains convinced that any contract awarding PDC the task of designing the Regents Road Bridge would be unlawful, and would be void *ab initio*. We stand ready to assist the Mayor and Council in moving forward on this issue in a manner that complies with the law.

MICHAEL J. AGUIRRE, City Attorney

By _____
Michael P. Calabrese
Chief Deputy City Attorney

MPC:

[6] As noted at the outset of this memorandum, BBK did not question the City Attorney's April 4, 2007 conclusion that the proposed Phase II contract would violate Gov't Code section 87100 as well as section 1090. As our April 4, 2007 memorandum noted, unlike under section 1090, there is no need to rely on case law to establish that section 87100 applies to independent contractors, as the statutory definition of a "public official" explicitly includes consultants in that context. Cal. Gov't Code section 82048.